IN ARBITRATION PROCEEDINGS PURSUANT TO SECTION 6.3 OF THE PERSONEL RULES AND REGULATIONS OF THE CITY OF FONTANA

CSMCS No. ARB-00-0136

Christopher D. Burdick, Esq., Arbitrator

Marlyss (Marty) Nicholson Appellant	/	
and	/	
The City of Fontana	/	**FINDINGS OF FACT AND AWARD**
Respondent	/	
re Ms. Nicholson's Appeal from Her Termination of December 23,1999	/	

Pursuant to Section 6.3 of City Resolution 98-44, the appeal of Marlyss ("Marty") Nicholson ("Nicholson") from the order of termination dated December 23, 1999 came on for arbitration hearings on April 3, 4, 26 and 27, 2001, at the Human Resources Department Conference Room, 8353 Sierra Avenue, City of Fontana, California.

Appearing on behalf of Appellant Nicholson was James Stoneman, Esq., Attorney at Law, and Ms. Nicholson. Appearing on behalf of the City of Fontana ("City") were Jack Clarke, Jr., Esq., of Best, Best & Krieger, and City Human Resources and Risk Management Director Gracie Harmon ("Harmon").

Christopher D. Burdick had previously been selected by the parties as arbitrator, pursuant to Section 6.3 of Council Resolution 98-44, the City's Personnel Rules and Regulations ("Rules"), from a list submitted to the parties, under that rule, by the

California State Mediation and Conciliation Service (CSMCS). The parties stipulated that all of the time deadlines and procedures of the appeal procedure had been complied with by Appellant and that the matter was properly in arbitration.

At the conclusion of the fourth day of hearings on April 27, the City asked for and was granted permission to call a final witness, Ms Gina McIntyre, to be questioned telephonically. That telephonic examination occurred (with the agreement and participation of counsel for the Appellant) on May 23, 2001. Post-hearing briefs were submitted simultaneously by counsel on May 24, and the matter stood submitted for decision at that time.

THE ISSUE

The parties stipulated to the following statement of the Issue to be resolved:

> Was Nicholson terminated for just cause? If not,
> what should the remedy be?

CONTENTIONS OF THE PARTIES

The City contends that Nicholson was an incompetent manager, incapable of dealing professionally and productively with her subordinates, peers, superiors, and the public; that she was devious and untrustworthy; that she lied about her performance and that of her subordinates, including testifying untruthfully under oath at the hearing; that she chronically and intentional violated the "chain of command" by communicating directly with the Manager or councilmembers rather than going through her boss; that she was a poor delegator who was incapable of accepting responsibility or blame for her own shortcomings or those of her subordinates; and that even after the intervention of an outside team-building consultant (Mr Darbeaux) and the efforts of her superior, Mr Aaron, she was incapable of meeting minimal City requirements for a division head. In regards to progressive discipline, the City contends that while it adheres to that doctrine as a general human resources principle, doing so here was pointless, as Ms Nicholson had demonstrated a chronic inability to follow direction or to bring her division up to acceptable standards and that giving her "another chance", after imposing some lesser

forms of discipline, would only have procrastinated the inevitable. As to the penalty, the City argues that it has the right to judge high-ranking managers and division heads on both subjective and intangible criteria, as well objective and demonstrable bases, and that termination was well within the bounds of reason under the totality of the circumstances.

Ms. Nicholson contends that she was a competent and professional manager who met all reasonable standards; that she was also a sensitive and caring supervisor who spent personal time and money on her subordinates; that her problems were the fruit of Mr Aaron's prejudice against women in general and her in particular; that Aaron's decision to recommend her termination to Mr Hunt was in direct (and illegal) response to her filing a personnel complaint of workplace discrimination against him; that she was never given the benefit of the two promised 90-day "probationary" periods which Aaron had placed her on; that the performance evaluations of her by Aaron were inaccurate, biased and unfair; that the City failed to comply with its own doctrine of progressive discipline in terminating her without ever resorting to any of the less severe disciplinary steps (such as written reprimands or suspensions); and that she should be reinstated, with full seniority, benefits and back pay.

RELEVANT PROVISIONS OF THE PERSONNEL RULES

Ms Nicholson was an unrepresented management employee not covered by a collective bargaining agreement or MOU. Thus, her rights (and the City's obligations) arise out of the City's Personnel Rules and Regulations (Res. No. 98-44; Jt. Ex. 25) and 100 years of the California common law interpreting and applying such statutes. Fontana is a general law city authorized to adopt such civil service, merit or personnel rules as the City saw fit, under the Civil Service Enabling Act of 1949, Cal. Gov. Code Secs. 45000 et seq. Section 6 of the Rules provide in pertinent part:

SECTION 6.

A regular employee in the classified service may be removed, demoted, or suspended only for cause.

Such employee shall have written notice of the reasons for such action and shall have the

right to appeal, pursuant to this Rule. Examples of conduct which may lead to disciplinary action include, but are not limited to:

a) Failure to meet reasonable work performance standards and requirements.

b) Fighting, physical abuse or discourteous treatment of the public or other employees.

c) Willful or negligent disobedience of any law, ordinance, City rules, Department regulation, or superior's lawful order.

……

d) Conduct unbecoming an officer or employee of the City.

……

k) Insubordination

……..

q) Violation of any City rules and/or regulations.

Ms Nicholson was **not** charged (as perhaps she might have been), with violation of (b), (k), or (q). The broad and vague provisions of rules such as (d) ("conduct unbecoming") have been held by some courts to be unconstitutionally vague as applied to non-peace officers such as Ms Nicholson. See discussion *infra*, at pp. 27-28. The personnel rules and regulations of a public employer constitute a contract of adhesion and any ambiguity or inconsistency therein will be construed in favor of the employee and against the public employer. Frates v Burnett and Hamilton v Stockton Unified School District.

Employees who have been disciplined may appeal pursuant to Section 6.3 and that process culminates in final and binding arbitration. At the conclusion of the hearing the arbitrator is required to "….make findings of fact, affirm, reverse or modify the decision appealed from….[and] [s]uch determination shall be final and conclusive."

PROCEDURAL SUMMARY

The parties stipulated that all of the time limits and requirements of the Rules had been met by Ms Nicholson in advancing her appeal. There are no complaints by the Appellant of non-compliance with the pre-removal due process requirements of Skelly v State Personnel Board, 15 Cal 3rd 194, 215 (1975). Therefor, no extended discussion of the procedures leading up to the arbitration is required.

Suffice it to say that on November 2, 1999 Ms. Nicholson received from her boss, Public Services Director Jon Curtis Aaron, two documents: (1) an Employee Performance Evaluation dated October 28 (JEx. 13) which recommended to the City Manager, Mr. Hunt, her termination; and (2) a one-page memorandum from Mr Aaron placing her on indefinite paid administrative leave (JEx. 12) .

In response to this first Notice of Intended Termination, Ms Nicholson attended an initial Skelly Hearing conducted by City Manager Kenneth Hunt; a revised Skelly Notice dated December 9, 1999 was issued at Mr Hunt's request (JEx 15); Ms Nicholson attended a second and final Skelly Hearing held by Mr Hunt on December 23, 1999; and the Notice of Termination was issued by Mr Hunt on the same day, December 23. Ms. Nicholson filed a timely Notice of Appeal. The arbitration hearings were held on the dates set forth above and were neither transcribed by a court reporter nor tape-recorded.

THE BURDENS OF PROOF AND PERSUASION

In a disciplinary matter involving a permanent, non-probationary employee of a public entity, the burden of going forward and the burden of proof on the charges of misconduct rest upon the public employer. Pipkin v Board of Supervisors, 82 Cal App 3rd 652 (1978) and Layton v Merit System Commission, 60 Cal App 3rd 58 (1976). The City must, by a preponderance of the evidence, prove **both** the violation (or violations) of reasonable city rules and procedures **and** that the discipline imposed is proportionate to the wrongs proved. See, generally, Skelly v State Personnel Board, 15 Cal 3rd 175, at 194 (1975).

Conversely, the Appellant bears the burden of proof on any substantive affirmative defenses, such as the major one alleged here, namely claimed retaliation by her immediate superior for her filing a complaint of workplace discrimination and harassment against him. See, generally, Short v Nevada Unified School Dist., 163 Cal. App. 3rd 1087 (1985).

GENERIC PRINCIPLES OF "JUST CAUSE"

The stipulated "Issue", *supra*, asks if Ms Nicholson was terminated for "just cause"; indeed, the City's Rules permit the imposition of discipline only "for cause". These words are a term of art in the employment/labor world and carry with them a number of well-established secondary meanings. As stated by *Koven & Smith,* "Just Cause: The Seven Tests" (BNA, 1998):

> The just cause standard presents a cluster of issues (such as the scope of the arbitrator's authority versus that of the employer) and consists of a number of different elements, and some arbitrators emphasize one whereas some give more weight to others. Proof of misconduct is the key for some; others tend to stress due process considerations, such as the employer's obligation to investigate all the circumstances before making any decision about discipline. Finally, some arbitrators emphasize "equity over law", stressing the sprit rather than the letter of the just cause standard.

Koven & Smith, *op.cit*., at p. 21.

The "seven tests" exhaustively examined by *Koven & Smith* provide a (sometimes) useful guide (and nothing more) to determine whether "just cause" has been met in a particular case. Of importance here is that, for the most part, the cases, awards, decisions and authorities relied upon by those authors consider (primarily in the private sector) rank-and-file unionized employees covered by a collective bargaining agreement, where the arbitration process is viewed (by the courts as well as the parties) as a part or continuation of both the collective bargaining and contract application process. We do not have that here – Ms Nicholson was not a rank-and-file employee but was, in fact, the manager/head of one of the City's largest divisions, only one step removed from the City Manager in the chain of command at her level. She was not represented by a union or covered by a Memorandum of Understanding (MOU), and her rights and obligations are

statutory in origin and nature and not contractual. See, generally, Longshore v County of Ventura, 25 Cal 3rd 14 (1979). Thus, many of the policies and philosophies which underlie the "seven tests" may not be applicable to her at all, or may be applicable only on a lesser level when applied to a manager such as Ms Nicholson. "Progressive discipline" is one facet of "just cause" and will be discussed *infra*.

F A C T U A L S U M M A R Y

Based upon a review of the entire record (consisting of the Arbitrator's voluminous notes of four days of hearing numerous witnesses under oath; hundreds and hundreds of pages of documents and exhibits; a review of the Appellant's performance evaluations; study of the Appellant's Skelly response, as well as her hundreds of pages of memoranda, E-mails and correspondence dating almost from the commencement of her employment; and considering the appearance and demeanor of the witnesses as they testified), the Arbitrator believes the following is the most accurate recital of the facts.

Prefatorily, it will become apparent to even the most casual observer of these proceedings that there exists a vast disparity between the views, opinions, perceptions and feelings of the parties and the witnesses – a greater gap between Ms Nicholson's subjective feelings and opinions about her own performance (and personality) as opposed to those held by her superiors, peers and subordinates (and their views and opinions of her performance as a manager) would be hard to imagine. We are reminded of Robert Burns (1759-1796) –

> Oh wad some power the giftie gie us
> To see oursels as others see us!
> It wad frae monie a blunder free us
> An' foolish notion[1]

Nicholson was hired, after competitive examination, in July of 1997 as Fontana's Recreation and Community Services Manager to run the City's Parks, Recreation and Community Services (PRCS) programs. Ms Nicholson has a BS degree from Central Michigan University and substantial course work towards a master's degree at San Diego State University. Although she had had substantial education, background, training and

[1] Robert Burns, *To A Louse*, st. 8 (1786)

experience in sports and athletics programs and coaching, Ms Nicholson's first employment as a director of parks & recreation at a city was with the City of La Quinta from 1995-97, followed by a (very) brief stint in 1997 at the City of Banning, in the same role, before she came to Fontana in July of 1997. Essentially, Fontana was Ms. Nicholson's first job in a larger municipality as a division head in charge of over 100 employees (including many seasonal, extra-help, and part-timers) in such a multi-faceted department – ultimately the task proved more than she could handle.

The record is silent on the state of pre-Nicholson PRCS morale, the performance and fate of her predecessor, and the general internal and external working relationship at PRCS prior to Ms Nicholson's arrival in July of 1997. We do not know if Ms Nicholson was hired into a division in ferment, with poor morale, low *esprit de corps* and a poor reputation in the community for service; or, conversely, into a tight, cohesive, effective and happy unit. We do know that the City was suffering the types of municipal finance problems not uncommon in such cities in the mid-1990s, and had experienced layoffs (or the threat of layoffs) after the repeal by the voters of a utilities users tax in 1998. This obviously had an unsettling effect on all city employees, including those at PRCS. We also know that, by the time she was terminated in December of 1999, a sizeable number of Appellant's peers and subordinates distrusted and disliked her and several had asked for transfers or left City service to avoid working for her. Ultimately, it was this steady erosion (real or perceived) in their trust and confidence in her credibility, veracity and management skill by her peers, subordinates and superiors which proved to be the "one egregious act" which led to the City's decision to skip "progressive discipline" and terminate her.

Initially, Ms Nicholson reported directly to the City Manager. But in November of 1998 there was a reorganization of several city departments (including Human Resources (HR) and the Department of Public Works (DPW)), and PRCS was placed in DPW, as one of three divisions therein. Ms Nicholson then reported directly to, and was supervised by, Mr. Curtis Aaron (Aaron), who had started with the City in 1990 as an Environmental Control Supervisor. The other two division managers in DPW were Mike Glasson (in Support Services) and Scott Bangle (in Operations), both also reporting directly to Aaron.

Aaron reported directly to the City Manager. PRCS is one of the City's largest divisions, delivering sports, athletics, aquatics, facilities rentals, a small public-interest community cable television program, and a variety of youth and senior citizens programs to the community, on properties owned by the City or by the Fontana Unified School District (FUSD), with which the City and PRCS must be in constant contact and on a good, sound relationship. Ms Nicholson directly supervised several Recreation Supervisors, a Youth Services Coordinator, and several secretaries and, through these people, a large group of permanent and seasonal recreational and program workers. During the summers, the work group could exceed one-hundred employees.

PRCS management is not headquartered in the same building as the rest of DPW but has its own main building approximately one mile or so away from DPW. This made casual, informal communications with Glasson, Bangle and Aaron difficult, if not impossible for Ms Nicholson, who testified that she felt shut out of the normal communications loop of the DPW and excluded from informal lunches with the other two division managers and that this exclusion was not the mere fruit of distance but of design. Ms Nicholson apparently experienced no problems with her first immediate superior, Mr Jeske. But after the reorganization and assignment to DPW she started to experience problems relating to, and communicating and working with, Mr Aaron. Ms Nicholson blames almost all of her woes on Mr Aaron, contending that, in fact, she was performing at or above a "Satisfactory" level, but that Mr Aaron either ignored her accomplishments and improvements or threw obstacles in her way to impede her progress. Mr Aaron did so because, it is claimed, he was prejudiced against women in managerial positions in city government. These defenses, assertions and contentions are discussed *infra*, at pp. 21-23.

The Notice of Termination (JEx. 16), although signed by the Manager, was basically prepared by Aaron and is drawn almost *in haec verba* from the original and revised Skelly Notices, both also prepared by Aaron (with some assistance and revisions of a technical nature by HR and a review by the City Attorney). The Notice of Termination dated December 23, 1999, lists four different bases for the termination: (1) "unsatisfactory work performance" from July 28, 1998 through October 29, 1999; (2) violating the "chain of command" by sending (and not for the first time) an unsolicited

Email to the Manager while he and Aaron were working on a sensitive employment matter involving one of Ms Nicholson's subordinates, Mr Serna; (3) attributing to Mr Aaron false and divisive statements Ms Nicholson falsely made to Ray Gonzales, her subordinate, that Aaron had allegedly made to her about Gonzales; and (4) a general pattern of behavior and conduct (such as the above) which caused such dissension among her subordinates that at least two (Ms Valenzuela and Ms Martinez) sought transfers from her division. The totality of these kinds of acts, errors and omissions, coupled with a general inability to meet the standards expected of a manager (in general and of PRCS in particular), formed the basis of the termination for "failure to meet reasonable work standards", "disobedience of a superior's lawful order", and "conduct unbecoming".

A. Unsatisfactory Work Performance from July 28, 1998 through October 29, 1999.

By June of 1999, the pattern of events, conflicts, errors and omissions described *infra* in Pars. B-D had apparently generated concerns at City Hall itself. Mr Hunt met with Aaron and Nicholson in that month, and told them both, directly, that some members of the council regarded PRCS as "dysfunctional" and that DPW needed to improve not only PRCS' work but its image and reputation. Mr Aaron understandably percieved that this message was directed not only at Ms Nicholson but at himself – if PRCS did not improve, he would be ultimately responsible. Not surprisingly, the pressure on Ms Nicholson for improvements (both real and percieved) from Mr Aaron increased, as reflected in his evaluations of her performance.

The City evaluates its employees annually, in writing, on standardized "fill-in-the-boxes" forms which cover a broad range of employee knowledge, skills and abilities, as well as performance (or the lack thereof). The format should be familiar to anyone conversant with public employment; see, e.g., JExs. 6, 17, 18. Five different overall ratings (based upon distinct ratings in 13 job or skill areas) are available – Unsatisfactory, Improvement Required, Competent, Superior, and Outstanding. The 13 performance areas rated range from the objective and quantitative ("Quantity of Work", "Bearing and Behavior") to the heavily subjective and qualitative ("Judgement", "Adaptability", "Leadership").

In her brief Fontana career, Nicholson received five evaluations – one favorable probationary report; two "annuals"; one for a merit increase; and the final evaluation recommending her termination. It is her contention that her first evaluations (which were "satisfactory" or higher) were fair and accurate reflections of her performance and abilities; that the subsequent evaluations by Mr Aaron were initially both unfair and inaccurate; and, after her written complaint against Aaron, became intentionally false, erroneous, and retaliatory in nature. These later evaluations formed the basis of the City's decision to terminate her.

The first evaluation (JEx 17) was done by then-Public Services Director Ken Jeske; covered a period of seven months, from July 28, 1997 through February 28, 1998; and was dated April 21, 1998. It rated her overall as "Superior", and the attached narrative was quite complimentary in every area.

The second evaluation (JEx. 18) was done by Mr Aaron, who had not supervised Ms Nicholson for much of the review period; covered July 28, 1997 through July 28, 1998 (thereby apparently duplicating the previous Jeske evaluation for the first seven months of that period); was dated March 11, 1999; and rated her overall as "Competent". There were no attachments or narrative accompanying this evaluation.

The third evaluation (JEx. 6) was done by Aaron; covered the period July 28, 1998 through July 29, 1999; was dated August 31, 1999 and acknowledged by Nicholson on that day; gave Nicholson on overall rating of "Competent"; but carried a three-page "Supplemental Evaluation" by Mr. Aaron which was highly critical in several key areas (e.g., Judgement, Leadership, and Cooperation); and placed her on two separate "…supplemental 90-day evaluation periods to review progress in addressing those areas [in which] I have voiced concerns." Although this evaluation did not expressly so state, and Ms Nicholson was not aware thereof, the first 90-day period kicked in retroactively to her anniversary date of July 28, 1999.

The fourth evaluation was a brief, one-page document issued for the purpose of granting a salary step merit increase; covered the period July 28, 1998 through July 28, 1999; was dated September 29, 1999; gave an overall rating of "Competent": and made no reference to the annual evaluation issued only one month before which had put Nicholson on the special 90-day evaluations.

The fifth (and final) evaluation was done by Mr. Aaron; covered the period July 29, 1999 through October 28, 1999; was dated November 2, 1999 and signed by Ms. Nicholson on that day; gave an overall rating of Unsatisfactory; attached yet another "Supplemental Evaluation" narrative of three highly-critical pages; and, based upon the from and the narrative evaluation of Nicholson's performance during the first of the two 90-day evaluation periods, recommended Appellant's termination. The Supplemental Narratives attached to the August 31 and November 2 evaluations referred to and relied upon the events described in (B)-(D), *infra*.

As noted above, the August 31 evaluation had "recommended" that Appellant be placed on two 90-day special evaluations. The record is silent on to whom that recommendation was made (we assume the Manager) and whether there was anything in writing from Hunt to Aaron accepting that recommendation. But it is clear that both Aaron and Nicholson assumed Aaron had gotten the authority to do this. Appellant makes three major complaints in this area: (1) being placed on special evaluations at all; (2) not being given a full 90-days for the first one; and (3) not being given chance to meet and succeed on the second 90-day evaluation at all.

There was testimony from Ms Harmon that these special or supplemental evaluations were unusual, but not unheard of, and had occurred before. There is nothing in the Rules to prohibit a department head from doing this. The gist of Appellant's complaint about being put on "specials" is somewhat circular and goes back to her underlying contention that all of Aaron's evaluations were biased and unfair and that the only fair and accurate evaluation she ever got was her probationary evaluation from Mr Jeske. No one called Jeske to testify, and his evaluation was based on only 7 months of work. Aaron's were based on the rest of Nicholson's career and a close (albeit strained and difficult) working relationship. Given the totality of the testimony, the Arbitrator cannot fault Aaron or Hunt for taking the supplemental evaluation approach?

But Appellant's argument that she was, in essence, cheated out of almost 1/3 of the first 90 days is accurate. She was not told until August 31 that she was going on two 90-day evaluations, and she was not told then (or later) that the 90 days would kick in **retroactively** to her anniversary date of July 28, 1999. She thus had only two months to

toe the mark. This was sloppy and unfair, but, in the end, the Arbitrator believes that it made little or no difference in Appellant's performance (or the lack thereof).

Appellant also complains that she was, in essence, "promised" a total of 180 days, with the first evaluation at the end of the first 90 days, and that the City breached this "promise" by terminating her without giving her the chance to meet or exceed the goals and objectives during the second 90 days. There is nothing in the August 31 evaluation which "promised" Appellant anything – Aaron said he would make a "recommendation", which was apparently accepted and implemented, but nothing therein was a promise (much less a legally enforceable promise) which guaranteed Appellant 180 days to improve her performance.

The City's case in support of its broad charge under Rule 6(a) (basically one of incompetence) consists basically of the following: the evaluations described immediately above; the testimony of Aaron and Hunt, Nicholson's immediate superiors, about their dissatisfaction and concerns; the testimony of Mr. Darbeaux; and the testimony of Nicholson's peers and subordinates, described in Par. D, *infra*. Much time was spent in the hearing going over the evaluations, with Appellant disputing practically every rating below "Competent" and testifying as to her accomplishments, skills, and abilities. A blizzard of memoranda notes, copies of E-mails, and the like accompanied this testimony. But to the extent that many of the areas evaluated are subjective and qualitative, reasonable minds may differ over the rating to be assigned. Mr Aaron believed, in good faith, that Appellant used poor judgement, lacked loyalty to him, could not be depended on to get the job done, and had chronically poor relations with her subordinates – Appellant disagreed. Based upon the totality of the evidence, the Arbitrator finds that the evaluations (and particularly the 1999 evaluations) were harsh but done in good faith and were fair and accurate reflections of Aaron's opinions and observations.

B. Violating the "Chain of Command" on October 19, 1999.

In October of 1999 City Manager Hunt had heard that Marcellino Serna, a PRCS employee of whom Hunt thought highly, was planning to quit. Both Aaron and Hunt wanted Serna to stay. Without first advising Nicholson that he was going to do so, Hunt arranged a meeting with Serna and Aaron in his office, in an effort (unsuccessful, as it

turned out) to persuade Serna to stay. Nicholson learned of this meeting from Ray Gonzalez and sent to Hunt Attachment 7 to JEx 7, an unsolicited, "cold" Email (without a "cc" thereof to her boss, Mr Aaron) in which she suggested to Hunt that he might want to first talk to her and Gonzales about Serna before making any decisions.[2] This was not the first time that Nicholson had sent unsolicited Emails to the Manager and to councilpersons without first clearing them with Mr Aaron.

Mr Hunt testified that he found the Email unsettling, as it indicated "mixed messages" from DPW, reflected continued conflicts within the Department among its managers, and was outside the chain of command. While he conceded that he had told employees he had an "open door" policy and that he had received unsolicited Emails from Ms Nicholson before (although generally on subjects on which they had had prior, ongoing communications or dealings), he testified that this was qualitatively different, an effort to intervene. Aaron said he found the Email disturbing because it was done without his prior consent or knowledge, violated the chain of command, and was one more example of Ms Nicholson's inability to work with him.

Ms Nicholson saw nothing wrong with the Email, at the time she sent it or at the hearing, either as to its content or its conception. She had sent such Emails to Hunt and councilpersons before and had never been told this was *verboten*. Her evidence binder contained numerous examples of such electronic missives, on diverse subjects, some with "cc's" to Aaron and some without. But she conceded that Aaron had indicated to her some frustrations over this type of communication, and Aaron testified that it was well-known that no one was to contact **any** councilmember without first receiving clearance from the Manager, a prohibition (common to most cities) that even extended to Aaron and all other department heads.

In and of itself, and standing alone, this single Email would not constitute sufficient "cause" for termination. But the Arbitrator concludes that it was intentionally sent to Hunt without any prior notice to Aaron and with the knowledge that Aaron would probably be upset both by its content and its method of delivery. This type of poor judgement and seeming disregard for the reaction that was inevitable (from a boss with

[2] The City Manager is the "appointing authority" in Fontana and makes the ultimate decision, at least in the legal and technical sense, on employment, promotion and disciplinary matters.

whom she was already experiencing significant difficulties) shows either a reckless disregard for the consequences of the act or a mystifying blind spot. At a time when she was on a 90-day review and under the closest scrutiny, a simple "heads up" to her boss before the fact was the least that common sense would have dictated.

C. Attributing False and Divisive Statements About Ray Gonzales to Mr Aaron.

Ray Gonzalez, a Recreation Supervisor of 10 years tenure, was one of Ms Nicholson's immediate subordinates and reported to her on an almost daily basis. On October 12, 199 during a normal meeting, Mr Gonzales raised the Serna situation with Ms Nicholson. At the conclusion of that conversation, Ms Nicholson gratuitously said to him (according to Gonzales – see Attachment 10 to JEx 13) "… Curtis [Aaron] feels you are worthless and he is getting his information from Scott [Bangle]." Mr Gonzales repeated this version of the conversation under oath and says that Ms Nicholson told him this twice, at two different meetings. After the second recitation, Gonzales testified, this ate at him, and so he went to confront Aaron several days later. Aaron told Gonzales that he neither held, nor had he ever expressed such an opinion. On the witness stand, Mr Gonzales reviewed Ms Nicholson's explanatory Email of October 20, 1999 to Aaron (Attachment 9 to JEx 13) and testified, "that's a lie". Ms Nicholson testified, under oath, in basic conformity with her October 20 Email to Aaron.

The Arbitrator believes Mr. Gonzales version of these events and finds Ms Nicholson's October 20 memorandum and testimony difficult to credit. This unfortunate pattern of conduct – of telling one person one thing and then denying it, or telling a different version to another person – is a consistent complaint made about Ms Nicholson by a number of the City witnesses, as well as something several employees expressed concerns about to Mr Darbeaux, the City's consultant. This deliberate falsehood (both in the Email and as a witness) would, in and of itself, constitute a sufficient basis for termination.[3] Coupled with complaints from other employees that this was a practice of

[3] Aaron described this event as "the straw that broke the camel's back" as far as his willingness to continue to work with Nicholson.

Ms Nicholson's, it forms a greater foundation for the City's decision.

D. Breeding a General Aura of Distrust and Dissension in the PRCS Division Which Led Some Employees to Leave City Service or Seek Transfers

Ms Nicholson called only one witness to testify – herself. The City put on a veritable parade of disaffected and distressed former subordinates and peers, all of whom testified to more or less the same thing: a boss with few "people skills"; one who delegated tasks but not responsibilities; one quick to blame but slow to praise; someone whom no one trusted, in charge of a department where the workers could not predict, from one day to the next, what was expected or desired of them.

Scott Bangle testified that he thought Nicholson was "a cancer" on DPW and conceded that he had told her directly that he thought she was "certifiable" (that is, crazy). Mr Glasson found her manipulative and devious. Mr Mata (the Senior Administrative Analyst and *de facto* "CFO" for DPW) found her untrustworthy (giving two concrete examples where he found her statements to others to be inaccurate recitals of the facts), and further testifying that the work environment at PRCS under Nicholson was bad and that his staff had complained to him of Ms Nicholson's inconsistencies. Yolanda Valenzuela found Ms Nicholson unprofessional in approach; resented being given a verbal reprimand in front of another employee; and watched Ms Nicholson argue in public with a citizen for 30 minutes over a disputed refund. Ms Valenzuela finally took unpaid leaves and asked for a transfer. Cindy Davis, who had worked with or for the City in various capacities for almost 20 years, listened to Ms Nicholson "criticize everybody – Curtis, Mike, Scott: they are all stupid, they're dumb, they're women-haters"; was shocked by her discovery of a video camera in Ms Nicholson's office; and left City employment because of her unwillingness to work under such conditions, something she stated in her resignation letter. Ray Gonzales believed her "people skills" vacillated, but that she was a "one-way supervisor: top-down only"; and, as a result, was mistrusted by her subordinates. Mary Martinez worked as Ms Nicholson's secretary on a daily basis until she asked for and got a transfer out of PRCS in September of 1999. Ms

Martinez did not trust Ms Nicholson and felt under-utilized and under-valued and also believed that Ms Nicholson had gossiped about her use of medication when she was on a prescription. Frances Hernandez described Ms Nicholson's conduct at a conference in Santa Clara, where Ms Nicholson publicly criticized (the absent) Brant Strong as "incompetent" for failing to make certain reservations and arrangements. Upon returning to Fontana, Ms Nicholson called Ms Hernandez on the phone, accused her of spreading gossip about those remarks, and told her that she was going to get her fired. Ms Hernandez told Ms Nicholson that that "was the last straw", went to Aaron, told him all of this, and requested a transfer. Gina McIntyre, formerly an HR Analyst with Fontana, had dealt with Ms Nicholson frequently and found her disorganized and prone to go over, and seek guidance on, the same matters repeatedly.

E. The City's Initial Response to The Earliest of These Concerns and Complaints

In late 1998, the beginning of these complaints and concerns caused Ms Harmon at HR to bring in an outside constant to survey, and work with, the employees and staff at PRCS. The City had never done anything of this type before and spent $10,000.00 in retaining Mr Wayne Darbeaux, an employee of the HR Department of the Port of San Diego who had consulted privately with municipalities on HR matters for over 10 years. Using a profile and process developed by Wm. H. Marston, Darbeaux administered standardized tests, interviewed the entire full-time staff at PRCS, and did a one-day team-building workshop. Based on his tests, interviews and workshop, Darbeaux concluded that Ms Nicholson was a "top-down manager", good at managing projects but not people; that her subordinates felt excluded from decision-making; that there was no team at PRCS as a result of her style and approach; that Ms Nicholson was inflexible; and, most importantly, not only did she not show flexibility but he believed she could not, and would not, change her style and approach. He voiced this latter conclusion directly to Mr Aaron.

F. Mr Aaron's Response to the Darbeaux Team-Building and The Employee Complaints

Mr Aaron was responsible, ultimately, as the Director of DPW, for all of these people, their well-being and their working environment. He became convinced that Nicholson's demeanor, her behavior and bearing, her habit of telling people one thing and doing another, of never being willing to accept responsibility for her own errors or those of her staff, and her constant efforts to shift the onus to others were chronic, immutable traits which resulted in low productivity and poor morale. The "straw that broke the camel's back" for Aaron was the Ray Gonzalez "worthless" incident. Even if Ms Nicholson was being truthful about the conversation (which means Gonzales was lying), Aaron testified that, as a manager, Nicholson never should have discussed the subject at all with her direct subordinate. His post-1998 evaluations reflected his concerns, and the August 31, 1999 annual evaluation took the drastic (but not unprecedented) step of imposing two 90-day special evaluation periods, during which Ms Nicholson was directed to show marked improvement in a number of areas.

To each and every one of these witnesses and complaints/allegations, Ms Nicholson has a reply. To many of them (e.g., Mr Gonzalez' version of the "worthless" conversation, or to Ms Hernandez' recitation of the Brant Strong remarks and follow up telephone conversation), Ms Nicholson simply denies that they occurred at all and implies that witnesses to the contrary have perjured themselves. The Arbitrator concludes, based upon close observation of the witnesses while testifying and on the totality of the record, that where there is a direct factual conflict ("he said/she said"), more frequently Ms Nicholson's version of the events is not as creditable as that of those who testified to the contrary.[4]

[4] The City correctly points out in its Brief that several of these witnesses are still clearly intimidated by, and fearful of, Ms Nicholson, as exemplified by their reticence and unease while testifying. In one unguarded moment, while counsel were perusing their binders for documents, Ms Nicholson gave a glare of such intensity at one City witness that the Arbitrator would not have liked to have been in the witness chair at the time.

The description set forth above is by no means exhaustive of the complaints and concerns of Mr Aaron (and of Ms Harmon) as reflected in the evaluations and in many memoranda and Emails between the parties. In addition to the above, Mr. Aaron was consistently frustrated with PRCS' inability (as he saw it) to put its daily cash receipts on a businesslike and accurate basis; Ms Nicholson had, without first checking with HR, surreptitiously videotaped several meetings and conversations with her staff, without the prior knowledge or consent of the workers; the City's contract compliance and reporting with its cable TV provider was chronically defective; the FUSD complained to City Hall about its PRCS concerns, especially about liability issues; etc., etc. As to each of these concerns, Ms Nicholson has fulsome and convoluted (and sometimes facially attractive) responses to all of them, often accompanied by a plethora of paperwork[5], memoranda, notes to herself, copies of Email messages, etc. "The witnesses all have a grudge" against her, she says, because she "disciplined or reprimanded them", or she "passed them over" for the promotions or assignments they wanted. She also presents a packet of awards and commendations, complimentary letters and newspaper articles, and the like.

But none of these third-hand (and usually hearsay) broad and generic "attaboys" (sometimes directed more at the PRCS Department as an entity itself than at Ms Nicholson) can outweigh the clear and unequivocal testimony of a large number of people who worked for her – none of them liked or trusted her. More importantly, none of them respected her, as a person or as a manager. The result was a major city division that was functioning at far less than its capacity, a workplace that was uncomfortable and unwelcoming for many of its workers. What is striking is that Ms Nicholson seems to be genuinely unaware, in some cases, of how people really felt about her and her management style and approach. She may truly believe that she is a warm and caring

[5] The Arbitrator believes that much of this paperwork was *post hoc*, an effort to create a paper trail to justify her actions or to shift the blame to others. For example, the Nicholson memorandum to Aaron of July 25, 1999 (JEx. 5) is a lengthy but unhelpful recital of past accomplishments and claimed present knowledge, skills and abilities which appears superficially impressive, but, upon closer examination, gave Aaron little guidance on her progress on the specific goals he had set. Her Weekly reports in late 1999 (e.g., JEx. 37) were merely a regurgitation of PRCS activity to date and did not respond to Aaron's deeper, generic concerns about Nicholson's performance and relationships with her staff. Nicholson was a prodigious producer of paper – most of which Mr Aaron did not want to see or read because he found it non-responsive to his broad, generic concerns – and most of it appears to have been produced to justify or explain inaction.

boss, one who puts in many uncompensated off-duty hours for her people. But the reality is that her staff saw and experienced her from an entirely different viewpoint.

One of the essentials of being an effective manager is to be trusted and respected, even if grudgingly. It is not necessary for a division head to win popularity contests or to be the object of affection. But one must command the trust and respect of one's peers and subordinates to function well. Ms Nicholson failed in this crucial area.

APPELLANT'S AFFIRMATIVE DEFENSE OF RETALIATORY TERMINATION FOR FILING HER DISCRIMINATION COMPLAINT

Appellant contends that the triggering event in the ultimate decision to terminate was Mr Aaron's negative reaction to her Complaint (JEx. 9) against him. On this matter, under Short, *supra*, Appellant bears the burden of proof of establishing that "but for" the filing of this Complaint, Mr Aaron would not have recommended her termination, and, as importantly, that City Manager Ken Hunt would have not adopted and followed that recommendation.

On August 19, 1999 Ms Nicholson presented to the City Manager an undated, 6-page, typed, single-spaced list of 36 separate and distinct complaints of hostile workplace and sexual harassment discrimination against Mr Aaron. JEx. 9. She had never voiced a prior complaint to Mr Aaron about any of these acts of alleged misconduct. But just two days before, on August 17, after reviewing a preliminary copy of her 1998-99 annual review (JEx. 6), Nicholson had sent Aaron a one-page handwritten note (JEx. 34) stating, in part:

> "1) What are my legal rights after this evaluation?
> 2) What is the # for Fair Labor and Housing?
> And can I meet with the City Manager?"

The undated Complaint (hand-delivered to the Manager directly and not filed with the HR Director, as is required by the complaint procedure, yet another example of Appellant's willingness to go straight to the top and jumping the queue) is a mish-mash of charges and accusations, concerns and complaints, ranging from the trivial to the

serious. Few of the charges were timely or dealt with current events and most went back some time in the past. But Charge 1 (the "f*** women" accusation) was serious and was treated as such by Ms Harmon. Aaron subsequently received an oral reprimand from the Manager for his use of crude and profane language and for his unconscious (if not uncaring) attitude towards the effect that such language had on its hearers. But most of the charges were stale or trivial (e.g., the complaints about the cartoons and jokes about her style of dress at a PRCS awards ceremony) and some bordered on the bizarre – No. 17, for example, claimed a physical disability or handicap, one of short-term memory lapses due to four prior auto accidents, which Ms Nicholson used to justify (for the first time, to the knowledge of anyone) her habit of putting everything in writing rather than verbalizing her positions and concerns.

The City's Policy on such harassment complaints guarantees complainants that they will be free from retaliation or adverse discrimination for the initiation of such complaints. The factual question here presented is whether Mr Aaron violated that prohibition.

The Arbitrator finds that he did not. Ms Nicholson's earlier August 17 note was clearly intended as a warning shot an attempt to have Aaron back off and reconsider his draft evaluation. In that regard, it was singularly unsuccessful. Indeed, Ms Nicholson never followed up her internal complaint (JEx9) with complaints to any state or federal agency. Nor did she appeal or grieve Ms Harmon's investigation report, summary and conclusions (JExs. 10 and 11), which basically exonerated Aaron of most of the complaints. Aaron did, however, draft and share with Appellant the preliminary August 31 evaluation (which recommended the two 90-day special evaluation periods) prior to August 19 – why else would Appellant have written the August 17 note (JEx. 34) to Aaron protesting the draft evaluation and disingenuously asking about her legal rights therein and requesting the phone number of DFEH ? It is apparent that the decision to make the August 31 evaluation (and the recommended two 90-day assessments) pre-dated the August 19 hostile workplace Complaint by at least two days and were not a

reaction to that filing nor to Ms Harmon's subsequent investigation

While Aaron was (understandably) unhappy about being the subject of this Complaint, the Complaint was investigated by Ms Harmon, and the vast majority of the dozens of charges were judged to be unmeritorious. Mr Aaron's sometimes coarse language and unconscious manner were noted and criticized by Ms Harmon. The City Manager subsequently reprimanded Mr Aaron orally for these shortcomings. But the Arbitrator does not believe, based on the totality of the evidence, that Mr Aaron was prompted, even in part, to initiate his recommendations merely by the filing of this Complaint. Certainly, Mr Hunt (who made the final decision) was not motivated in any part to act (or not act) by Ms Nicholson's filing or by Ms. Harmon's investigation, findings and disposition.

In fact, the Arbitrator believes that the Appellant's primary motive in filing the harassment Complaint (as with the delivery of the August 17 note: JEx. 34) was more the creation (or continuation) of a paper trail, as well as a "warning shot" across Mr Aaron's bow than it was a good faith belief by Appellant that she had been the victim of an ongoing pattern and practice of discrimination on the basis of her gender.

APPLICATION OF PROGRESSIVE DISCIPINE CONCEPTS TO THIS CASE

Although the City's rules make no reference thereto, both the Manager and the HR Director concede that the City adheres to, and believes in, concepts of "progressive discipline". The City contends that here "one egregious act" justifies skipping the lesser steps and going straight to termination. The "one egregious act" is described as "being an incompetent manager".

In the usual case, the single outrageous event is just that, a single act or omission which is so glaring and shocking that it militates against giving the employee another chance. Thus, fighting, theft, lying to a superior, assault on a supervisor, or the commission of a crime are usually considered sufficient to justify termination without the necessity of progressive discipline. Koven & Smith, "Just Cause: The Seven Tests", *op. cit*., state:

> "Inherent in the concept of 'cause' or 'proper cause' is the concept of 'progressive discipline', which is not something for which the union must bargain. Moreover, 'inherent in the concept of progressive discipline is the idea that employees enjoy certain rights of due process and one of those rights is notice of problems on the job.'" For all but the most serious types of misconduct (e.g., theft), progressive discipline functions as a graduated system of penalties for repeated rule infractions.
>
> *op. cit.,* at p.60
>
> Underlying all systems of progressive discipline is the notion that discipline and discharge systems above all must be fair and just on both a substantive and a procedural or due process level …. Another principle underlying progressive discipline is that "the punishment should fit the crime.""
>
> *op. cit.,* at pp. 386-387.

Appellant correctly argues that she was never the subject of any formal discipline, received no reprimands or suspensions, and she claims she was thus deprived of her right to some form of progressive discipline. In particular, she notes that she was not given the chance to do her second 90-day special evaluation (and was, in fact, only allowed to do about 2/3 of the first evaluation). This argument has some facial attraction until we recall that the basic purpose of progressive discipline is "notice", with the resulting chance to conform to the employer's rules and expectations. Two things militate here against giving Appellant "a second chance".

First, although there was no one, "single outrageous event", in the classical sense, (although Aaron personally regarded the Gonzales "worthless" episode as "the straw that broke the camel's back), Appellant had more than adequate written notice of the City's expectations, of Mr Aaron's disappointment with her past performance and his insistence that she improve to his standards. The evaluation of March 11, 1999 (overall "competent" but a significant drop off from the prior Jeske evaluation, coupled with Appellant's concession that she knew she was "in trouble" with Aaron at this point and was

concerned he was "not going to evaluate me fairly") and that of August 31, 1999, together with their weekly meetings and several pointed memoranda from Aaron to Nicholson, could have left her in no doubt that she was teetering on the edge.

Second, when dealing with a manager at the Appellant's level, it is difficult for the employer to engage in an escalating series of suspensions without pay (or even paid administrative leaves) without substantially disrupting the operation of the division/department and generating rumor, speculation and uncertainty among the workers. That is, it is one thing to reprimand and then suspend without pay a police officer for chronic tardiness, in the fond hope he/she will start to get to work on time. But the same problem with a police captain cannot usually be dealt with in the same way. If repeated warnings to the captain, and substandard evaluations, do not do the trick, there is little reason to believe that a mere suspension will be effective. Although Nicholson never received a written "reprimand" in the technical sense (see, e.g., Turturrici v City of Redwood City, 190 Cal App 3rd 1447 (1987)), the evaluations gave her more than adequate notice of what Aaron wanted and the consequences of failing to deliver.

In sum, under the facts and circumstances of this case, the Appellant's high position in the City hierarchy, and her prior evaluations, the Arbitrator concludes that strict application of "progressive discipline" is not required in this case and that the City was entitled to impose the ultimate employment sanction of termination, without here violating progressive discipline concepts and principles. The Arbitrator cannot conclude that, with an employee at this level in the City management hierarchy, it was unfair and unreasonable to go to termination. See, e.g., Schmitt v City of Rialto and Talmo v Civil Service Commission, 231 Cal App 3rd 210, 229 (1991).

FINDINGS OF FACT

Based on the recitals set forth above, the Arbitrator makes the following Findings of Fact, as required by Section 6.3 of Resolution 98-44:

1. Marlyss Nicholson was employed by the City of Fontana on July 28, 1997 as the City's Recreation and Community Services Manager and was

terminated on December 23, 1999, for cause.

2. During her tenure, Nicholson failed to meet the City's work performance standards and requirements of her management position.

3. In particular, Nicholson alienated and antagonized the majority of the full-time employees in her division and lost their trust, respect and confidence; failed to resolve the Division's daily cash receipts problems; failed to comply with the City's contract with its cable television provider; consistently misled her superior and failed to meet his standards and expectations; fabricated a story to one of her subordinates, Ray Gonzales, about statements allegedly made about him by her superior, and then misrepresented to her superior what she had told Mr. Gonzales when confronted with the matter ; consistently violated the "chain of command" and engaged in improper direct communications with the City Manager and members of the council; disrupted the City's relationship with the Fontana Unified School District; and generally failed to exhibit the necessary knowledge, skills and abilities required of a division manager of the City.

4. The performance evaluations given to her in 1999 by her superior, Mr Aaron, reflected and advised her of these types of short-comings, were done in good faith and were fair and accurate reflections of Aaron's opinions and conclusions about her performance.

5. The recommendation by Aaron to the City Manager that Nicholson be terminated was not prompted or influenced, in whole or in part, by Nicholson's filing a complaint of alleged employment discrimination and harassment against him.

6. The decision by the City Manager to terminate Nicholson was not prompted or influenced, in whole or in part, by Nicholson's filing of a complaint of employment discrimination against Mr Aaron.

7. Just and sufficient cause existed for the imposition of termination rather than some lesser sanction.

APPLICATION OF THE FINDINGS OF FACT TO THE CLAIMED PERSONNEL RULES VIOLATIONS

The acts, errors and omissions described above constituted both failure to meet reasonable work standards and requirements and negligent disobedience of the orders and directions of her superior. The City rule prohibiting "conduct unbecoming" an officer or employee of the City" is probably unconstitutionally vague and unenforceable when applied to a non-peace officer such as Ms Nicholson (see, generally, Jabola v Pasadena Redevelopment Agency, 125 Cal App 3rd 931 (1981) and California School Employees Assn. V Foothill Community College Dist., 52 Cal App 3rd 150 (1975); *cf.*, Cranston v City of Richmond, 40 Cal 3rd 755 (1985), such a rule constitutional when applied to a narrow occupational group, such as peace officers, teachers or veterinarians). But we need not decide that intriguing legal issue here in light of the conclusion that the City has established that Appellant was guilty of repeated failure to comply with subsections (a) and (c) of Rule 6.

A W A R D

The City had just and sufficient cause to terminate Ms Nicholson, and, therefor, her appeal is DENIED in its entirety. The Notice of Termination dated December 23, 1999 is sustained and affirmed.

DATED: July ____, 2001

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Christopher D. Burdick, Arbitrator